



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office

Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
09/447,023	11/22/99	BERRY	N 00414-046001

JOHN J GAGEL
FISH & RICHARDSON PC
225 FRANKLIN STREET
BOSTON MA 02110-2804

IM22/1211

EXAMINER

PRATT, H

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED:

12/11/00

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.

09/447,023

Applicant(s)

Berry et al.

Examiner

Pratt, Helen

Group Art Unit

1761

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Status

- ☐ Responsive to communication(s) filed on 10-26-00
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-84 is/are pending in the application.
- Of the above claim(s) 1-65, is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 66-84 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement.

Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
 - ☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been received.
 - ☐ received in Application No. (Series Code/Serial Number) _____.
 - ☐ received in this national stage application from the International Bureau (PCT Rule 1.7.2(a)).

*Certified copies not received: _____

Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☒ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other _____

Office Action Summary

Art Unit: 1761

DETAILED ACTION

Election/Restriction

1. Applicant's election with traverse of Group IV in Paper No. 6 is acknowledged. The traversal is on the ground(s) that other claims should be included in Group IV. This is not found persuasive because these claims are found in separate groupings which have been shown to be unrelated.

The requirement is still deemed proper and is therefore made FINAL.

Claim Rejections - 35 U.S.C. § 112

2. Claims rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Claims 66-84 are rejected under 35 U.S.C. 112, first paragraph, as based on a disclosure which is not enabling. The Yellow Bell cranberry, which is critical or essential to the practice of the invention, but not included in the claim(s) is not enabled by the disclosure. See *In re Mayhew*, 527 F.2d 1229, 188 USPQ 356 (CCPA 1976).

Since the Yellow Bell cranberry is essential to the claimed invention it must be obtainable by a repeatable method set forth in the specification or otherwise be readily available to the public. If said cranberries are not so obtainable or available, the requirements of 35 U.S.C. 112 may be satisfied by deposit(s) of the cranberry. The specification does not

Art Unit: 1761

disclose a repeatable process to obtain the Yellow Bell cranberry, and it is not clear from the specification or record that the cranberries are readily available to the public.

This rejection may be overcome by establishing that the particular Yellow Bell cranberry identified is readily available to the public and will continue to be so for a period of 30 years or 5 years after the last request or for the effective life of the patent, whichever is longer, or by an acceptable deposit as set forth herein.

Alternatively, in order to certify that the deposit meets the criteria set forth in 37 CFR 1.801-1.809, applicants may provide assurance of compliance by an affidavit or declaration, or by a statement by an attorney over his/her registration number, showing that,

- (a) during the pendency of the application, access to the invention will be afforded to the Commissioner upon request;
- (b) all restrictions upon availability to the public will be irrevocably removed upon the granting of the patent;
- © the deposit will be maintained in a public depository for a period of 30 years or 5 years after the last request or for the effective life of the patent, whichever is longer; and,
- (d) the deposit will be replaced if it should ever become inviable.

The specification must also state the date of deposit(s), the number(s) granted the deposit(s) by the depository and the name and address of the depository.

Art Unit: 1761

Claim Rejections - 35 U.S.C. § 112

4. Claims 79, 82, and 84 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. No methods are described in the specification for making any and all cranberry food products.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 66-68, 70-73, 75-82, 84 are rejected under 35 U.S.C. 103(a) as being unpatentable over Confectionery Production (abstract CP) in view of Ashurst et al.

CP discloses that it is known to make natural colorants derived from berries. Factors such as anthocyanin content and factors which affect the anthocyanin content and color intensity are known, and the use of a combination of fruit juices to achieve a particular color. Claim 66 differs from the reference in the use of a particular cultivar of cranberry and claim 67 in the amount of juice from Yellow Bells. However, it is well known in the art of blending fruit juices to use cultivars which have various characteristics.

Art Unit: 1761

Ashurst et al. discuss the amount of color pigments found in citrus cultivars which will vary with the variety, maturity, seasonal variations and the growing region, (page 60-2.24). Also, the specification discloses that it is known that cranberries are blended to meet minimum red color standards, (page 2, lines 1-6) and that Yellow Bells are found in Maine (page 13, lines 10-20). It is not clear at this time whether the Yellow Bells are a common cranberry species, or have been developed by applicants. Therefore, it would have been obvious to use known cultivars which have particular colors and other characteristics which are inherent to blend with other juices to make a juice product.

The particular amounts of juice as in claim 67 is seen as being within the skill of the ordinary worker as it is well known to mix fruit juices from various cultivars which have various characteristics. Ashurst et al. disclose as in grapes that various cultivars are known which have particular characteristics as in the amount of acidity and sugar (page 89, 2nd para.). Also, the reference discloses that it is known to predict sweetness, sourness and acidity in grape juice by measuring certain carbohydrates and organic acids and that these characteristics have resulted in part from new horticultural process techniques that modify the sugars and acids in grapes in order to optimize juice quality (page 89, last two para.). On page 159, 2nd para., and 235, it is disclosed that it is known to blend various juices with different characteristics to achieve a balanced sugar acid ratio. Granted, the particular fruit is different in the reference than that claimed. However, the principles are certainly applicable to any source of fruit juice. Therefore, it would have

Art Unit: 1761

been obvious to use particular amounts of juice which has particular characteristics in a blended juice product.

It is also, well known that various red fruits have varying levels of anthocyanin levels as in claim 68 (Ashurst et al., page 179) as can be seen from their coloration.

Blending of juices with various characteristics is known as above. Therefore, it would have been obvious to use particular levels of anthocyanin in juices to achieve a particular color.

The limitations of claims 70-73, 77, 78 have been discussed above and are obvious for those reasons.

Claims 75 are to a fresh fruit mixture and claims 76 and 82 are to a dried cranberry, and claims 84 is to a sauce, jam or jelly. However, cranberries are well known to be used in all of these products or methods of making, using red ones instead of yellow. Also, white cranberries have been seen in bags of red cranberries. As these yellow Bells are known in Maine, it would have been obvious to use known yellow berries, for their variation in color in food products as a source of nutrition and variety, just as other varieties of apples, grapes and oranges are routinely mixed and blended to give various flavor characteristics.

Claim 79, is to collecting Yellow Bells and processing them into a food product. However, it is known to process cranberries in general, and blended juices are well known as in claims 80 and 81. Therefore, it would have been obvious to process the

Art Unit: 1761

Yellow Bells in the same manner to make a cranberry product, taking into consideration the cranberries acidity, and color which is generally done anyway.

Claims 69, 74, 83 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied the above claims, and further in view of O'Mahony et al. or Ismail.

O'Mahony et al. or Ismail disclose that the infusion of fruits, in particularly cranberries is known. Nothing new is seen in infusing a particular cultivar of cranberry as in claims 69, 74 and 83, absent a showing of unexpected results. Certainly, infusing a Yellow Bell would produce a product of that color, with other inherent characteristics, just as infusing a red cranberry would have produced a red product. Therefore, it would have been obvious to infuse particular cultivars to make a food product.

Any inquiry concerning this communication should be directed to Helen Pratt at telephone number (703) 308-1978.

hp 12-5-00

HJ Pratt
12-5-00